IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 978 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

G S R T C

Versus

SARFUDIN K SAIYAD

Appearance:

1. Special Civil Application No. 978 of 1994

MR HS MUNSHAW for Petitioner No. 1

MR JS BRAHMBHATT for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 20/02/2002

ORAL JUDGEMENT

#. Heard Mr.H.S.Munshaw, learned advocate appearing on behalf of the petitioner and Mr.J.S.Brambhatt, learned advocate appearing on behalf of the respondent workman.

#. In the present petition, the petitioner Corporation has challenged the award passed by the Labour Court, Nadiad in Reference No.522/87 dated 30th August, 1993, whereby the Labour Court has granted reinstatement with continuity of service with 25 % backwages of interim period. This Court has issued RULE and granted ad-interim relief in terms of Para-8[C] by order dated 24th January, 1994. Mr.J. S.Brambhatt, learned advocate for respondent workman has submitted that though, ad-interim relief against reinstatement has been granted by this Court, the respondent workman has already been reinstated in service and at present he is working with the petitioner Corporation but 25 % backwages awarded by the Labour Court vide the award impugned in this petition, has not been paid to the respondent workman by the petitioner corporation so far.

#. Learned advocate Mr.H.S.Munshaw appearing on behalf of the petitioner Corporation has contended that the respondent workman remained absent from 1st September, 1983 and thereafter, chargesheet was issued to the respondent workman and departmental inquiry was initiated against the respondent workman. In departmental inquiry, the respondent workman had not remained present and ultimately, the competent authority had issued show cause notice and finding given by the competent authority that charge levelled against the respondent workman was found to have been proved as per the show cause notice which served on the respondent workman and thereafter, the respondent workman has been dismissed from services on 8th March, 1984. The respondent workman had raised industrial dispute before the Labour Court challenging dismissal order. However, contention of learned advocate Mr.Munshaw is that the respondent workman remained absent without prior permission of the authority and therefore, it amounts to serious misconduct in public corporation which caused inconvenience to the public at large and therefore, serious view ought to have been taken in the matter. But the Labour Court has committed error in exercising the powers under Section 11-A of the Industrial Disputes Act, 1947 and granted reinstatement with 25 % backwages to the respondent workman. Mr.Munshaw, learned advocate has also submitted that though opportunity was given to the respondent workman but he chosen not to remain present in the departmental inquiry and as such, no defence has been put forward by the respondent workman before the departmental inquiry authority and therefore, dismissal order has been rightly passed by the competent authority. He also submitted that looking to the past record also, punishment of dismissal is just and proper and no interference is

required by the Labour Court while exercising the powers under Section 11-A of the Industrial Disputes Act, 1947. For this purpose, Mr.Munshaw, learned advocate has relied upon the decision of the Division Bench of this Court [Coram : Mr.Justice B. C. Patel and A.L.Dave, JJ.] rendered in case of MAGANBHAI L. CHAUHAN v. DIVISIONAL CONTROLLER, G.S.R.T.C. reported in 1999 [1] G.L.H. 527, wherein the Division Bench has taken view that termination for wilful absence and absence from duty especially in cases where the employees is connected with public services cannot be tolerated. Mere production of a medical certificate justifying absence, without prior intimation will not exonerate an employee, particularly when in the inquiry proceedings the charge is proved, looking to the past conduct and in absence of the delinquent examining the Doctor, order of dismissal has been confirmed by the division bench of this Court. Mr.Munshaw also submitted that this is also case relating to the public corporation and the respondent workman remained absence wilfully without prior permission and therefore, intervention of the Labour Court amounts to an error which requires to be rectified by this Court by exercising its inherent powers.

#. Learned advocate Mr.J.S.Brambhatt appearing on behalf of the respondent workman has submitted that the respondent workman has remained absence because he was sick and this fact was disclosed by the respondent workman to the concerned authority by written application which was received by the concerned authority. Therefore, the authority despite of having full knowledge, not only conducted the inquiry in absence of the respondent workman but said inquiry is concluded exparte and ultimately, dismissal order was passed. He also submitted that looking to the past record, there was no repeated misconduct for remaining absence which required to be deal with seriously. Mr.Brambhatt also submitted that the judgment of the Division Bench cited by Mr.Munshaw, learned advocate is not applicable to the facts and circumstances of the case as the division bench of this Court has considered hard facts of past bad record and the delinquent in the case, had produced medical certificate which was not proved in the departmental inquiry and therefore, the decision of the Division Bench cited before this Court, would not applicable to the facts of the present case. Mr.Brambhatt has also submitted that the Labour Court having wide discretionary powers. If the Labour Court is satisfied that looking to the facts and circumstances of the gravity of the misconduct, if order of dismissal is not justified, then the Labour Court having powers to

modify the punishment and to pass appropriate orders. Therefore, the Labour Court has rightly exercised the powers under Section 11-A of the Industrial Disputes Act, 1947 and denial of 75 % backwages can be said to be sufficient punishment imposed on the respondent workman. Therefore, no error has committed by the Labour Court which requires any interference by this Court.

#. I have considered submissions made by the learned advocates for the parties. The respondent workman who was working as Helper with the petitioner Corporation. The petitioner Corporation has produced finding given by the competent authority. In finding itself, wherein it is mentioned in terms that the respondent workman remained absent without prior permission with effect from 1st September, 1983 and therefore, chargesheet was sent to the respondent workman on 1st October, 1983. Said chargesheet was received by the respondent workman. In reply to the chargesheet, the respondent workman had sent his reply which was also received by the competent authority. However, in the said reply sent by the respondent workman, wherein it was stated that he is suffering from Malaria and therefore he is not able to resume his duty. It is also stated therein that as and when he will be able to resume his duties, he will produce necessary certificate and report for duty. This fact is not disputed because it is undisputedly recorded in the finding of the competent authority. Therefore, it was come on record that after receiving the chargesheet, on first stage, the respondent workman has immediately informed the competent authority that he is suffering from Malaria and he is not able to resume his duties. Moreover, this fact has not been disputed, nor denied by the competent authority that the respondent workman was suffering from Malaria. It is also necessary to note that despite of knowingly fully the fact by the concerned authority that the respondent workman is suffering from Malaria and he is not able to resume his duties, the petitioner Corporation has not waited even for some time till the respondent workman gets fully recovered from illness and until he resumes his duties and by that time, exparte inquiry would not have been conducted against the respondent workman. But the petitioner Corporation has not waited even for some time for the workman till he recovers and resumes his duties and consequently, dismissal order has been passed. However, fact remains that the respondent workman remained absent, no doubt, without prior permission. But this fact was brought to the notice of the competent authority by way of his reply against chargesheet that on account of his sickness, he is not able to resume his duties. One more aspect which

requires to be noted that after this sickness, the respondent workman was injured and his one leg has been injured. This fact reveals from the record of the award and thereafter, the respondent workman has submitted report of sickness to the competent authority. However, past record of the respondent workman has been produced by the petitioner Corporation before the the Labour Court and even before this Court, which revels that in all four defaults are recorded against the respondent workman. Out of all four defaults recorded against the respondent workman, default dated 22-4-1974 is not relating to absenteeism but it is not serious misconduct, for which, Rs.150/fine was imposed by the petitioner towards punishment. So far the second default dated 2nd July is concerned which is charged for not putting up the route board but for this default, no punishment was imposed on the respondent workman. Third default is registered for remaining absent for one day on 17th February, 1975, for which, only warning was given to the respondent workman. The last default dated 12th December, 1977 which is forth in the default card is registered for remaining absent from 12-12-1977 to 23-12-2977, for which, the respondent workman was punished by imposing fine of Rs.3/- for the default. Thus, these are in all four defaults in the entire service career of the respondent workman and no other record has been produced by the petitioner Corporation either before the Labour Court or this Court. Considering these four defaults, two are relating to absenteeism and even for these two defaults of absenteeism, the respondent workman was given penalty of Rs.3/- fine for one default only and another one, he was given warning. For one of the default, he was given punishment of fine of Rs.3/-. Therefore, in above view of the matter, it seems that prima facie, the respondent workman had not committed any serious misconduct in past. It is also pertinent to note that the judgment of the Division Bench of this Court relied upon by the learned advocate Mr.Munshaw for petitioner, wherein the division bench has considered the past record of the delinquent in para-4 of the judgment, which reveals that 23 incidents in his record as regards absenteeism. Naturally, the division bench has taken a different view looking to the past record of such careless and negligent workman concerned. The Division Bench of this Court has considered that the Labour Court has not given any cogent reason in support of its conclusion. The Labour Court has not assigned any reason and only on the ground that the medical certificate was produced and therefore, benefit of doubt should go to the appellant. This approach of the Labour Court is not accepted by the Division Bench, therefore, considering the award passed

by the Labour Court being without any reason, casual approach and non application of mind of the Labour Court and considering past record of the appellant, the Division Bench has confirmed the order passed by the learned Single Judge. But these facts are not available in the case on hands. Therefore, the view taken by the Division Bench considering only past record of the workman concerned, cannot be compared with the present case inasmuch as the past record of the respondent workman in the present matter is not as bad as it was in the case of the delinquent involved in case before the Division Bench. In the instant case, there are only two defaults and / or misconduct of remaining absent without prior intimation. For first default, the punishment of warning was issued and for second default, fine of Rs.3/was imposed by the competent authority. Therefore, it can be presumed that the respondent workman having good past record looking to the length of his service and thereafter, the respondent workman remained absent with effect from 1st September, 1983 on the ground of sickness that he was suffering from Malaria and on the ground of some injuries on his leg. Therefore, looking to all these aspects of the matter, straight away dismissal punishment imposed by the competent authority, seems to be quite harsh punishment looking to the gravity of the misconduct. It is also observed that it was the duty of the punishing authority that while imposing punishment to see socio economic and family background of the respondent workman, as also the gravity of the misconduct, length of service and past record and compelling circumstances for committing the misconduct. In the present case, the competent authority has not at all taken into consideration any such relevant aspects while imposing harsh punishment of dismissal. Order of dismissal has been passed only on the ground that he had remained absent without prior permission, so also the ground that the delinquent remained absent in the inquiry proceedings. Therefore, dismissal order has been passed without taking into account the past record of the respondent workman. Even in finding which is on record, the competent authority has not mentioned about his past record. On the contrary, Rule 6-B of the S.T. Corporation Disciplinary Appeal Proceedings Rules provides that while imposing punishment on the delinquent, it is the duty of the punishing authority to take into account the gravity of misconduct and past record of the concerned workman. In the instant case, the competent authority has totally ignored the past record which can be said to be not bad but good service record and therefore, according to my opinion, the Labour Court has rightly exercised the powers considering the

fact that the respondent workman remained absent on account of his sickness and that sickness was intimated by the respondent workman in his reply to the chargesheet but despite of this fact, exparte inquiry was not only held and concluded by the competent authority in absence of the workman. In light of these factual aspects of the matter, the facts before the Division Bench are different from the facts of the case on hands and therefore, in my humble opinion, the judgment of the division bench would not applicable in the facts and circumstances of the present case.

#. It is also necessary to note that one fact which is established before the Labour Court that the workman had remained absent without prior permission and this aspect cannot be disputed by the respondent workman but merely to remain absent without prior permission due to sickness cannot be punished to an extent of economic death which ultimately not only result into unemployment of the respondent workman but adversely affects the family to face starvation also. The conduct of the workman cannot be compared with or expected to the conduct of the Class-I Officer. After all, workman is workman, there are some limitations of the workman. The workmen are working hard in hard days with public in all seasons. Some time the workman has to remain out of family far away for number of day and even their residents situate at quite distant place from the working place, so some times, it is very difficult for the workman to inform the competent authority immediately as to his sickness because of the distant place. Some times, the workman are not much literate and educated as intelligent alike Class-I Officers and the workman could not be as vigilant as Class I officer and they can not be expected to act as promptly as the Class I officer acts in such situation on occasion for proceeding on leave. Therefore, while examining conduct of the workman, the competent authority cannot compare the working conditions with the higher officer. The Labour Court has considered these facts that workman remained absence without prior permission and for which, 75 % backwages are denied to the workman considering to be sufficient punishment. Therefore, according to my opinion, the Labour Court has not committed any error while exercising the powers under Section 11-A of the Industrial Dispute Act, 1947 and granted reinstatement with 25 % backwages of interim period. This Court is having limited jurisdiction while exercising the powers under Article 226 and 227 of the Constitution of India when the order of Labour Court is being examined by this Court. However, it is settled position of law that the powers of this Court are very

limited while examining the legality and validity of the award passed by the labour court. The view taken by the Apex Court in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another reported in 2000 SCC [Labour and Service] pg.471, the Apex Court has held that while exercising the powers under Article 226 and 227 of the Constitution, interference with pure finding of fact and Reappreciation of the evidence is held to be impermissible. The High Court does not exercise appellate jurisdiction under Article 226. Even insufficiency of evidence or that another view is possible, it is held that no ground to interfere with the findings of the Industrial Tribunal. Recently also, the Apex Court has considered this aspect in case of SUGARBAI M. SIDDIQ AND OTHERS V. RAMESH S. HANDKARE reported in 2001 [8] SCC pg.477, the Apex Court has held that scope of powers of High Court is concerned not with the decision of the lower court / tribunal but with its decision-making process. High Court must ascertain whether such Court or tribunal had jurisdiction to deal with a particular matter and whether the order in question is vitiated by procedural irregularity, then only High Court can interfere with, otherwise, not.

#. It is also necessary to consider one old decision of this Court [CORAM : A. M. AHMADI, J.] in respect of absenteeism in case of SARDARSINH DEVISINGH V. DISTR SUPDT OF POLICE SABARKANTHA AND OTHER reported in 1985 GLH 940. I would like to quote relevant observations made in para-7, which runs as under :-

"7. In the instant case no punishment was imposed on the petitioner for remaining absent without leave in the past. He remained absent without obtaining leave from the disciplinary authority. That means that the misconduct proved is that he remained absent without leave for 150 days. The question then is what punishment should be imposed on him for this misconduct ? Is the misconduct so grave or gross that the petitioner cannot be tolerated in service ? Is it such that an opportunity to improve would be a futile exercise ? If the petitioner is visited with a penalty which is short of removal or dismissal from service, is there evidence to suggest that he will not learn a less and improve in future ? The answer is there is no such evidence. The guilt established against the petitioner can never fall in that category which would necessitate termination of service. In my opinion, the guilty would fall in the category

where an opportunity to improve by visiting the petitioner with a lesser penalty would serve the ends of justice. No one says that such conduct of remaining absent without leave should be tolerated, nay, a person guilty of such conduct must suffer punishment. But it is not necessary to be so harsh as to throw him out of service. It may be realised that being a petty police constable, his absence may not be even felt as much as it would be felt if a higher level officer behaves in this fashion. In a case like this, I think the ends of justice would be met if instead of terminating the services of the petitioner by an order of dismissal, the petitioner is visited with the penalty of withholding of two increments with future effect. This economic loss for him would be a constant reminder that he should not misbehave in future as he had down in the past. But if despite this he does not show improvement and commits similar defaults, the authorities would be justified in imposing a harsher penalty in future. I am, therefore, of the opinion that it is not possible to sustain the order of dismissal passed against the petitioner because it is clearly disproportionate to the established guilt."

#. On more decision on the same subject matter given by the Bombay High Court in case of DIVISIONAL CONTROLLER, M.S.R.T.C. SHOLAPUR V. RAJJAK ABBAS SHAIKH reported in 2000 Lab.I.C. 608. Relevant observations made in para-4 quoted as under :-

"4. Shri Sawant, the learned advcoate for the petitioner, submits that even the grant of 50 % backwages to the respondent workman is not legal, proper and justifiable. He has pointed out the past record of the workman that he was in the habit of remaining absent from time to time unauthorisedly and without prior intimation. During his 15 years of service, he was punished for 7 times for absenteeism. He has also pointed out that once in the year 1979, he was even dismissed from employment for absenteeism but in the departmental appeal filed by the respondent workman the appellate authority took a lenient view and reappointed the respondent workman. The learned advocate for the petitioner, therefore, submits that though the view, there was no improvement in the attendance of the respondent workman, and therefore, finally the corporation

was left with no alternative but to resort to the extreme punishment of dismissal. The past record of the workman is reflected in para 7 of the impugned order. There is no dispute about the said past record of the respondent workman and his absence from time to time. Shri Dalvi, the learned Advocate for the respondent workman, however, has stated that the respondent workman had in fact, submitted his leave applications and that there were number of difficulties for which the respondent workman was remaining absent. I do not find any substance in the said submissions advanced on behalf of respondent workman. He has also submitted that by depriving the workman of 50 % backwages, he has been sufficiently punished and he has also not filed any counter petition for the same. I do not agree with the said submissions. The petitioner industry is a different one in nature. It caters to the needs of the public at large which comprises the passengers who cannot afford to avail the facility of rich transport. The drivers who are employed to drive the public vehicles, if remained absent in the manner in which the respondent workman has remained, it does, cause great inconvenience to the people and there is great inconvenience caused to the management also to arrange for alternate drive, who may not be available on the spot. The inconvenience caused on account of abrupt or sudden absence of the employees is obvious, particularly, the drivers engaged to drive the public vehicles. The petitioner corporation has not resorted to the extreme punishment at the very first instance of absenteeism of the respondent workman. The petitioner has tolerated him for quite some time and ultimately when there was no improvement in his behaviour the petitioner dismissed the respondent workman. During the tenure of 15 years if the respondent workman was punished for as many as 7 times for remaining absent unauthorisedly, in my opinion, on the 8th time he has been rightly dismissed from employment. Since the Labour Court has interfered with the punishment under Section 11A of the Industrial Disputes Act and ordered reinstatement, which has been accepted by the petitioner corporation, that is the end of the matter. In any case, I am not at all inclined to put premium of 50 % backwages which would cause monetary burden on the public which has already suffered hardships and

inconvenience on account of the habitual absenteeism of the respondent workman. In fact the respondent workman should have shown improvement in his attendance when he was punished for 7 times. Inspite of the said punishment, the respondent workman did not show any improvement, and therefore, the petitioner was left with no alternative but to resort to the extreme punishment of dismissing the workman in the year 1985 when the respondent workman again remained absence for the period stated hereinabove."

#. Similarly, this Court has also considered one case of absenteeism wherein the workman remained absence without prior sanction of leave and did not participate in departmental inquiry and medical certificate was produced before the Labour Court for the first time and the Labour Court has granted reinstatement without backwages. This award has been confirmed by this Court [CORAM : MR.JUSTICE B. C. PATEL, J.] in case of DANA KARSAN MANVAR V. DIVISIONAL CONTROLLER, GSTC AND ANOTHER reported in 2001 [3] GLH 442. Relevant observations made in para-13 & 14 are quoted as under :-

"13. Learned advocate has relied on the judgment of a Division Bench of the Bombay High Court in the case of C.P. Singhania v. The Maharashtra State Co.Op Marketing Federation Ltd. reported in 1995 [3] LLJ [SUPPLY] 278. In that case, the concerned employee was arrested on the charge of misappropriation. However, the Judicial Magistrate found that the employee was not guilty of the charge levelled by the police. In that case, there was no notice served and no steps were taken departmentally. In paragraph 3, the Division Bench specifically observed that the Labour Court also held that the petitioner [employee] was removed from service only because the police arrested him and the removal was without any notice upon the petitioner. In that case, it was argued that the employee was not entitled to order of reinstatement or backwages because there was ample material to justify the contention of the employer regarding loss of confidence. The whole basis of removal of the petitioner before the Bombay High Court was that the police had arrested him on the charge of misappropriation. The Division Bench held that in view of the fact that the employee was acquitted, the arrest can have no impact upon the

rights of the petitioner. Under the circumstances, this decision cited by the learned advocate for the petitioner in the instant case is of no assistance to him. In the instant case, the tribunal has considered the fact that the employee initially did not participate in the departmental inquiry and did not co-operate. Even he did not submit report about his sickness. The Tribunal examined the powers under Section 11-A of the ID Act and the punishment has been reduced and his backwages has been withheld with a direction to take the petitioner in service to his original post with continuity of service. The tribunal has considered all the aspects and therefore, it cannot be said that the order of the Tribunal required interference.

14. It appears that the learned advcoate wanted to argue this petition under Article 227 as if it is an appeal. In the instant case, the workman remained absent for a long period from 8-3-1980 to 6-6-1980 and did not furnish any leave report or fitness certificate to resume the duty; He did not take part in the proceedings despite the process of inquiry served on him; Even after serving charge-sheet, he did not submit any report that he was physically unfit. Considering all these aspects, the Labour Court has passed the impugned order. "

#. Recently also, the Apex Court has considered the scope of Article 226 and 227 of the Constitution of India in case of OUSEPH MATHAI AND OTHER V. M. ABDUL KHADIR reported in 2002 [1] SCC 319. The relevant observations in para 4 & 5 are quoted as under :-

"4. It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said article as a matter of right. In fact power under this article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits,

ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

5. In Warayam Singh v. Amarnath this Court held that power of superintendence conferred by Article 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This position of law was reiterated in Nagendra Nath Bora v. Commr. of Hills Division & Appeals. In Babhutmal Raichand Oswal v. Laxmibai T. Tarte this Court held that the High Court could not, in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal. After referring to the judgment of Lord Denning in R. V. Northumberland Compensation Appeal Tribunal, ex p Shaw [All ER at p.128] This Court in Chadavarkar Sita Ratna Rao v. Ashalata S. Guram held : [SCC pg.460, para 20]

"20. It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of the fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution look into the fact in the absence of clear and cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a findings are perverse and not based on any material evidence or it resulted in manifest injustice [see Trimbak Gangadhar Telang]. Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has

sought to interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indiction of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limit of jurisdiction under Article 227 of the Constitution. On the first point, therefore, the High Court was in error."

##. Recently also, the Apex Court has considered the scope of Article 226 and 227 of the Constitution in case of ROSHAN DEEN VS. PREETILAL reported in [2002] 1 SCC Pg.100. Relevant observations in para-12 are quoted as under :-

"12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measure to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it [vide State of U.P. v. District Judge, Unnao]. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

##. In view above discussion and observations made by the Apex Court and considering the finding given by the Labour Court, as also the gravity of misconduct of remaining absent without prior permission due to sickness

which is not disputed by the petitioner Corporation and even as per the finding of the competent authority recording the reply of the respondent workman, while considering the gravity of misconduct committed by the workman, standard of expectations of conduct of higher officer or Class I officer cannot be taken into account. On the contrary, the conduct of the workman is required to be looked into considering atmosphere, living condition of the workman in the society, his family circumstances are also much relevant while examining the gravity of misconduct committed by the respondent workman concerned. It is duty of the punishing authority to see that in S.T. Corporation, the workmen are residing in remote place of district and their working place are situated on much distant place from their residence. They are residing in such far area where facility of communication may not be available. Even some times, in family of such workman, no such person is available who can communicate such incident to the higher authority of the Corporation. Some times, such workman is required to work continuously at working place and may not be able to visit residence even for a month or so. In such situation, if the workman, if all of sudden, falls sick, he may not be able to report immediately to the officer and such conduct cannot be considered to be serious one if punishing authority considers these hard realities of living condition of the workman. Sometimes, the workmen used to communicate about such report through their colleague to the higher authority, for that, no proof will be available but some times, the officers are taking action ignoring such oral communication by his colleague against such workman in vengeance manner. At this juncture, it cannot be ignored to observe that S.T. Corporation is normally retaining 10 % leave reserved quota maintained at every depot and this 10 % leave reserved quota of total strength of the workmen working in depot. Therefore, if all of sudden, in the event of absence of any single workman, will not disturb administration of the Corporation and there may not be any situation which will necessitate the Management to cancel the schedule inasmuch as, this arrangement is usually made by the petitioner Corporation knowing fully well that such situation may occur at any time and therefore, schedule may not be disturbed. Therefore, merely the workman remained absent due to sickness and not able to obtain prior permission in writing, such situation cannot be considered to be a serious misconduct, for which, punishment of dismissal ultimately economic death can not be inflicted on the workman. The Labour Court has given cogent reasons in support of his conclusion. The Labour Court has denied backwages of 75

% for the misconduct of remaining absent without prior permission and only granted 25 % backwages of interim period. Therefore, according to my opinion, the Labour Court has jurisdiction to exercise the powers under Section 11-A of the Industrial Disputes Act. It is discretionary powers of the Labour Court and the Labour Court has rightly exercised the powers looking to the facts and circumstances of the case. There are two views, the judgment of Apex Court reported in AIR 1994 SC 215 relating to absenteeism, wherein the Apex Court has considered that absenteeism cannot be considered to be a serious misconduct obseving that;

"2. ....
The incumbent while admitting the fact that he had over-stayed the period of leave had explained the circumstances in which it was inevitable for him to continue on leave as he was forced to do so on account of unexpected circumstances. We are of the opinion that the punishment of dismissal for over-staying the period of 12 days in the said circumstances which have not been controverted in the counter is harsh since the circumstances show that it was not his intention to wilfully flout the order, but the circumstances force him to do so. In that view of the matter the learned counsel for the respondent has fairly conceded that it was open to the authorities to visit him with a minor penalty. If they so desired, but a major penalty of dismissal from service was not called for. We agree with this submission."

Whereas, in one other decision reported in 1999 SCC Labour and Service pg.666, the Apex Court has held as under :-

"4. In our view, in the facts and circumstances of the case, the punishment of dismissal from service is too harsh and on the contrary it is required to be substituted by appropriate lesser punishment. Learned counsel for the respondents after instructions has stated that appropriate lesser punishment may be awarded by this Court. It will be acceptable to the respondents. In our view, ends of justice will be served if we set aside the order of dismissal of the appellant and instead direct reinstatement of the appellant in service with continuity and with all other benefits save and except

> withdrawing 50 per cent of back wages from the date of dismissal i.e. 11-10-1988 till today. In our view, this punishment which will involve substantial monetary loss to the appellant will meet the ends of justice and will be a sufficient corrective measure for the appellant. The request of learned counsel for the respondents that two future increments may also be withheld without cumulative effect does not appear to us to be justified on the peculiar facts and circumstances of the case. In our view, the aforesaid monetary loss to the appellant will meet the ends of justice so that he may be careful in future. It is ordered accordingly. At the request of learned counsel for the respondents eight weeks time is granted to the respondents to comply with the present order and to reinstate the appellant with continuity in service and with all other benefits. We make it clear that from today onwards the appellant will be entitled to full salary. Both the appeals are allowed accordingly. The orders of the Tribunal dated 4-11-1996 and 13-2-1997 are set aside. O.A. No.714 of 1993 filed by the appellant in the Tribunal shall stand allowed in aforesaid terms. In the facts and circumstances of the case, there will be no order as to costs."

Both these judgments are relating to absenteeism of workman for 15 days period and the Apex Court has taken view that in such absenteeism or overstaying on leave without informing the employer, cannot be said to be serious misconduct and punishment of dismissal is to be considered as harsh and disproportionate. Therefore, according to my opinion, the Labour Court having jurisdiction to pass such award. There is no procedural irregularity committed by the Labour Court. As such, there is not dereliction of duty or grave injustice to any party while passing such award and therefore, in my opinion, there is no substance in the petition, deserves to be dismissed.

#. The matter on hands is of the year 1994. The award passed by the Labour Court on 30th August, 1993 and ad-interim relief has been granted by this Court on 24th January, 1994 and therefore, according to my opinion, now the Corporation shall require to pay 25 % backwages within some reasonable time. Therefore, it is directed to the petitioner Corporation to pay 25 % backwages as awarded by the Labour Court by order dated 30th August, 1993 to the respondent workman within period of three

months from the date of receipt of the copy of this order.

In the result, present petition stands rejected. Rule is discharged. Ad-interim relief, if any stands vacated. No order as to costs.

Date : 20-2-2002 [H.K.Rathod, J.]

#kailash#